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No. 80-1199

IN THE
Supreme Court of the United States
OCTOBER TERM, 1981

THE AMERICAN TOBACCO COMPANY, *et al.*,
Petitioners,
v.
JOHN PATTERSON, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF FOR PETITIONERS BAKERY, CONFECTIONERY AND TOBACCO WORKERS INTERNATIONAL UNION AND ITS LOCAL 182

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QUESTION PRESENTED

Whether the immunity from Title VII liability given to bona fide seniority systems under § 703(h) applies to seniority systems instituted or revised after the effective date of Title VII.

LIST OF PARTIES

A complete list of the parties to this action appears on the caption of the petition. Specifically, the petitioners are:

The American Tobacco Company, a division of American Brands, Inc.
American Brands, Inc.
Bakery, Confectionery & Tobacco Workers International Union (the successor to Tobacco Workers' International Union, which merged with Bakery & Confectionery Workers International Union to form the presently-named union in 1978)
Local 182 of Bakery, Confectionery & Tobacco Workers International Union.

The respondents are:

John Patterson
Marion Moshoe
Edmund Page
James Randolph
Percy Taylor
Equal Employment Opportunity Commission

The first five named respondents were certified by the district court to represent a class of black employees of American Tobacco Company.

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BRIEF FOR PETITIONER UNIONS

This brief is the joint product of petitioners Bakery, Confectionery & Tobacco Workers International Union [1] and its Local 182 (hereinafter collectively "the Union"), and American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), the federation of national and international unions with which the Union is affiliated. The decision to file a single brief reflects the identity of their views on the issue presented, and their desire to minimize the burdens on the Court by stating their common position only once.

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[1] This suit was instituted against, *inter alia*, Tobacco Workers International Union and its Local 812. In 1978, Tobacco Workers International Union merged with Bakery & Confectionery Workers International Union to form the present Bakery, Confectionery & Tobacco Workers International Union

OPINIONS BELOW

The *en banc* opinion of the Court of Appeals for the Fourth Circuit which this Court has granted certiorari to review is reported at 634 F.2d 744, and the panel opinion that it replaced is reported at 586 F.2d 300. An earlier opinion of the Court of Appeals in this case is reported at 535 F.2d 257, *cert. denied*, 429 U.S. 920. Opinions of the district court in this case are reported at 8 FEP 778 (1974), 11 FEP 577 (1974), and 18 FEP 377 (1977). All of the afore-cited opinions are reprinted in the Joint Appendix.

JURISDICTION

The judgment of the Court of Appeals was entered on November 18, 1980. The petition for writ of certiorari was filed on January 16, 1981, and granted on June 15, 1981. This Court has jurisdiction to review the decision below pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 703(a) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a), provides as follows:

> (a) It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Section 703(c) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(c), provides as follows:

> (c) It shall be an unlawful employment practice for a labor organization—

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership, or to classify or fail to refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

Section 703(h) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(h), provides in pertinent part as follows:

Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin. . . .

STATEMENT OF THE CASE

Petitioner Local 182 is the exclusive bargaining representative of employees at a number of plants of Petitioner American Tobacco Company, including two separate plants in Richmond, Virginia, which are the subject of this action: the Virginia Branch (at which cigarettes

are manufactured), and the Richmond Branch (at which pipe tobacco is manufactured). Two separate actions were filed challenging employment practices at these plants; one by the EEOC, and the other by five black employees who were certified to represent a class of black employees at the plants. The actions were consolidated.

The case was initially tried prior to this Court's decision in *Teamsters v. United States*, 431 U.S. 324, at a time when the rule in the Fourth Circuit was that Title VII invalidated innocently-motivated seniority systems that perpetuated the effects of pre-Act discrimination (unless proved by the defendants to be a "business necessity"). *Robinson v. Lorillard Corp.*, 444 F.2d 791 (CA 4, 1972), *cert. dismissed*, 404 U.S. 1006. The district court found that pre-Act discrimination was being unlawfully perpetuated by the "facially fair and neutral" seniority system in two respects: (1) seniority was measured by length of service within one's branch ("branch length of service"), which deterred black employees from transferring from one branch to the other, and (2) there were six lines of progression (LOPs) that were not justified by business necessity and that, by requiring employees to promote job-by-job, delayed the access of black employees to the jobs at the top of these LOPs. JA 2-11.[2] The court of appeals affirmed these rulings, but remanded for further proceedings respecting remedy. JA 70-83. On remand, the district court entered a judgment requiring, *inter alia*, that blacks be permitted to carry their seniority when transferring from the prefabrication department of one branch to the fabrication department of the other, and that the six LOPs be eliminated. JA 138.

Following entry of that judgment, this Court decided *Teamsters*, and the Company and Union moved under

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[2] There were nine LOPs, but the district court found that three were justified by business necessity. JA 31-32.

F.R.Civ.P. 60(b) for relief from the judgment. The district court denied the motion. JA 109-110. On appeal, a panel of the court below ruled (1) that the question of the legality of the contractual use of branch length of service as the measure of seniority required, in light of *Teamsters*, more explicit findings from the district court (which was free to reopen the record to receive further evidence as to *bona fides*), JA 117-118, but (2) that the lines of progression were not part of a "seniority system" within the meaning of § 703(h), so that the original holding that they were unlawful irrespective of motivation remained proper and was not vulnerable to a Rule 60(b) motion, JA 116.[3]

The Company and Union filed petitions seeking rehearing *en banc*. While those petitions were pending, this Court decided *California Brewers Assn. v. Bryant*, 444 U.S. 598, giving a broader reading to the term "seniority system" than had been applied in the panel decision.

The *en banc* court ruled unanimously that on the question of the legality of the use of branch length of service as the measure of seniority the case had to be remanded and the record reopened to receive further evidence as to *bona fides*. JA 145-147. That ruling is not before this Court. The ruling which *is* before this Court is that relating to the LOPs.

The majority of the *en banc* court held that the LOPs were unlawful whether or not they were innocently motivated, and whether or not they were part of a "seniority system" within the meaning of § 703(h) (a question the majority did not address, JA 142-143, n. 3), because they were "adopted in January 1968," JA 143. The court reasoned that § 703(h) is "a quite narrow exception to Title VII's general coverage of all 'conditions of employment' ", JA 144, n. 4, and "[i]n line with that narrow interpretation" (*ibid.*) the panel majority

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[3] Judge Widener dissented from the ruling respecting lines of progression, JA 122-125.

concluded "that the legislative history of § 703(h) . . . conclusively demonstrates that Congress intended the immunity accorded seniority systems by § 703(h) to run only to those systems in existence at the time of Title VII's effective date, and of course to routine post-Act applications of such systems," JA 143-144.

Judge Widener, joined by Judge Russell, dissented. Preliminarily, he noted his doubt as to the correctness of the majority's holding that § 703(h) is inapplicable to seniority systems adopted subsequent to enactment of Title VII:

> The Supreme Court has specifically noted in *Teamsters* that § 703(h) on its face immunizes all bona fide seniority systems. 431 U.S. 348, n. 30. Although § 703(h) is written as an exception and not as a grandfather clause, the majority transforms an ordinary exception into just that. Congress undoubtedly knows how to write a grandfather clause if it wishes, but in this case wrote an exception instead. New plants, for instance, are summarily excluded from § 703(h) in the majority view, without stated justification." [JA 160, n. 1].

But the principal focus of his dissent was to the adequacy of the record to support the majority's finding that the LOPs were "adopted in 1968". He noted that the district court had made no findings on the point (JA 161), that the record evidence appeared to indicate that a much larger number of LOPs (including these six) had existed in practice prior to the Act (albeit not expressly prescribed in the collective bargaining agreement), and that in 1968 the parties had substantially reduced the number of LOPs, with these six being among the few surviving (JA 162-177). If this is correct, he noted, the 1968 "change" benefited the black employees, for it reduced the number of LOPs without creating any new ones (JA 165-166, 182). In his view, a remand was necessary so that the district court could make findings in

the first instance as to whether that was the correct reading of the record (JA 177).

The majority appended a footnote to its opinion explaining its reasons for rejecting the dissent's proposal of a remand on this factual issue:

> Without attempting here an exhaustive counter-analysis of the factual record, our perception is that while the informal rudiments of what is now described as a "job lines of progression policy" certainly existed before 1965, the stated procedures adopted by American in 1968 to control entry into and promotions within specifically identified job "lines" involved enough of change and formalization (whether in favor of or against employee interests) to constitute a *new* policy, or at least one so radically altered from prior unstructured procedures that it could not be considered simply a "routine application," see *Teamsters*, 431 U.S. at 352, of those pre-1965 procedures. [JA 143, n. 4; emphasis in original].

The majority's implicit acknowledgment that the only "change" in 1968 may have been one "in favor of" the interests of minority employees, coupled with its holding that that "change" withdrew the "immunity" of § 703(h), drew a rebuttal from Judge Widener:

> The only way the majority can find liability on this record without further fact finding by the district court is by giving such a "stringent reading" [of § 703(h)] against the employer and the union that it actually finds liability when all the employer and the union tried to do was to improve the existing conditions for the plaintiff class . . . for it must be remembered that *each relevant change in the collective bargaining agreements disclosed in this record, whether pre- or post-act, has benefited the plaintiff class. None have been to its detriment.*
>
> . . . [T]he majority boldly holds that a change in a previously existing seniority system, although the

change may be in favor of a class of black employees, will deprive the company and the union making the change from the benefit of a § 703(h) exemption.

Nothing I can think of could be less founded either in law or logic. [JA 182-183; emphasis in original].[4]

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[4] Judge Widener explained:

> The law . . . rejects this conclusion in *United Steelworkers v. Weber*, 443 U.S. 193 (1979), in which the holding of the court was that it was not a violation of the 1964 Civil Rights Act for an employer and a union to agree to a preference for minority employees. The court said that the act is "intended as a spur or catalyst to cause employers and unions to self-examine and self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history." 443 U.S. at 204. Thus, *Weber* approved actions by employers and unions designed to alleviate previously existing discriminatory conditions of employment. That part of the majority opinion providing that a company and a union cannot alter a seniority system so as to make more favorable the conditions of employment of minority employees is directly contrary to *Weber*, I think. It requires a too strained construction of the statute to hold that a seniority system admittedly discriminatory in effect, as in *Teamsters*, is protected by § 703(h) so long as it remains unchanged, but if it is changed in favor of the minority employees, then the employer and the union lose their § 703(h) exemption.
>
> Not only is this conclusion contrary to logic and law, it is a blow against minority employees and contrary to the purpose of the statute. Hereafter, in this circuit at least, neither an employer nor a union may safely agree to any change in a seniority system existing before July 1, 1965 for fear that its § 703(h) exemption will be lost. Thus, a seniority system as rigid as the one approved in *Teamsters*, which protects a group of white employees, under the provisions of § 703(h), will receive the sanction of the statute and the blessings of this court, while a seniority system equally as rigid but which by the action of the employer and the union has, since July 1, 1965, ameliorated a part of the previously existing discriminatory conditions, will not. Such a conclusion, I suggest may sound astonishing, yet that is precisely what the majority holds. [JA 183-184].

INTRODUCTION AND SUMMARY OF ARGUMENT

A majority of the court below has held that § 703(h) of Title VII of the Civil Rights Act of 1965 applies only to seniority systems "in existence at the time of Title VII's effective date," and that systems negotiated after that date (or, as here, changes after that date in pre-existing systems) even if innocently motivated are unlawful if they perpetuate pre-Act discrimination. No other lower court has adopted that construction of § 703(h), and numerous lower court decisions have applied § 703(h) to protect post-Act systems and changes absent discriminatory intent.[8] Those decisions and not the decision below are faithful to Congress' intent.

We begin our argument by showing that the lower court's narrow reading of § 703(h) cannot be squared with the carefully crafted statutory language Congress wrote, which protects without qualification "bona fide seniority . . . systems" that are "not the result of an intention to discriminate."

We then demonstrate that, contrary to the court of appeals' supposition, the Congressional discussions concerning Title VII's effect on seniority confirm that § 703(h) should be read to mean what it says. There is not a single instance in which a proponent of the bill said

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[8] *Hameed v. International Ass'n. of Bridge, Etc., Local 396*, 637 F.2d 506 (8th Cir. 1980); *Alexander v. Aero Lodge No. 735*, 565 F.2d 1364 (6th Cir. 1977), *cert. denied*, 436 U.S. 946 (1978); *EEOC v. McCall Corp.*, 24 FEP Cases 432, (S.D. Ohio 1978), *aff'd sub nom., EEOC v. McCall Printing Corp.*, 633 F.2d 1232 (6th Cir. 1980); *Johnson v. Burroughs Corp.*, 24 FEP Cases 963 (S.D. Fla. 1980); *Sanders v. Sherwin Williams Co.*, 495 F.Supp. 571 (E.D. Mich. 1980); *Pate v. Transit District*, 21 FEP Cases 1228, 1245 (N.D. Cal. 1979); *Edmondson v. United States Steel Corp.*, 20 FEP Cases 1745 (N.D. Ala. 1979); *Freeman v. Motor Convoy*, 20 Empl. Prac. Dec. ¶ 30,090, p. 11,493 (N.D. Ga. 1979); *Edmonds v. S. Pac. Transp. Co.*, 19 FEP Cases 1052 (N.D. Cal. 1979).

what the lower court held: that § 703(h) does not protect post-Act seniority systems. Rather, Title VII's supporters responded both broadly and specifically to the charge that the legislation would destroy existing seniority rights. In virtually every instance, the response was broad and unqualified: the bill would have no effect on seniority systems. In the written materials submitted by Senator Clark relied on by the court below, the response was tailored to the charge: the claim that the bill would affect existing seniority rights was false; the bill would *not* affect existing seniority rights. But the totality of Senator Clark's statements leaves no doubt that he did not intend to draw a distinction between existing and future seniority rights. Indeed, Senator Clark explained that he had introduced the very materials upon which the court below relied to make "clear that the bill would not affect seniority at *all*" (110 Cong. Rec. 7207; emphasis added). Each one of Title VII's proponents who addressed the subject affirmed Senator Clark's assurance that the bill would not affect seniority.

We conclude with a demonstration that the decision below, by imposing stiff penalties on employers and unions that make step by step changes in a pre-Act seniority system (even in a manner that benefits minorities and women), frustrates both Title VII's purpose to spur voluntary affirmative action and the natiornal labor policy granting employers and unions flexibility to structure seniority systems to their evolving needs. As this Court has recognized, Congress intended that Title VII not intrude upon these important legislative policies.

ARGUMENT

1. The Statutory Language.

Section 703(h) is "a definitional provision; as with the other provisions of § 703, subsection (h) delineates which employment practices are illegal and thereby prohibited and which are not." *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 758.[6] By its terms, § 703(h) extends immunity without qualification to "bona fide seniority . . . system[s]" that are "not the result of an intention to discriminate". The language of § 703(h) draws no distinction between seniority systems negotiated before the Act and seniority systems negotiated after the Act. It is hardly likely that Congress in a "definitional provision" would choose words of universality if all that was intended was a "grandfathering" of pre-existing seniority systems.

The unlikelihood that Congress' words are so at variance with its intent is magnified when the circumstances of the drafting of § 703(h) are recalled. Section 703(h) was a part of the "Dirksen-Mansfield" substitute which broke the longest filibuster in American history. Senator Dirksen explained that the substitute "represents not merely weeks but months of labor" (110 Cong. Rec. 11935), and concluded:

> I doubt very much whether in my whole legislative lifetime any measure has received so much meticulous attention. We have tried to be mindful of every word, of every comma, and of the shading of every phrase. [*Id.* at 11935].

Finally, the argument that § 703(h) means what it says is made more binding by the abundant evidence that Congress is no novice at drafting "grandfather" clauses. Such provisions are common in federal legislation, in-

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[6] See also *Teamsters*, 431 U.S. at 346-347; *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 82.

cluding labor legislation.[7] It is utterly improbable that Congress would have failed to employ traditional "grandfather" language if that is all that was intended by § 703(h).[8]

2. The Legislative History.

(a) There is not a single statement in all of Title VII's legislative history that says what the court below has held, i.e. that § 703(h) does *not* protect seniority systems adopted or changed after July 2, 1965. And as this Court has emphasized, "[a]bsent a clearly expressed legislative intention to the contrary" the language of the statute "must ordinarily be regarded as conclusive." *Consumer Product Safety Comm'n v. GTE Sylvania*, 447 U.S. 102, 108. The absence of such a statement is, we submit, dispositive, and the lower court's refusal to accord § 703(h) its plain meaning is plain error. Nonetheless in what is perhaps an excess of caution we demonstrate that the court of appeals erred not only in its approach, but in its reading of the legislative materials.

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[7] See, for example, the "grandfather" language in § 102 of the Labor Management Relations Act (LMRA), Ch. 120, § 102, 61 Stat. 152 (1947), immunizing certain practices undertaken pursuant to pre-Act collective bargaining agreements which would otherwise have been unfair labor practices under the terms of the Act. See also, § 302(f) of the LMRA (29 U.S.C. § 186(f)), and §§ 2(a), 9 and 12 of the Portal-to-Portal Act (29 U.S.C. §§ 252(a), 258 and 261).

[8] An additional aid to statutory construction is furnished by the fact that § 703(h) legitimatizes in a single phrase all differences resulting from "a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production." It hardly seems likely that Congress intended to exempt only those merit and incentive systems that were in place on the effective date of the Act—indeed, it is impossible to construct a hypothesis as to legislative purpose which would have made such a choice rational—yet if § 703(h) is not a "grandfather" clause as to them, would Congress have placed seniority systems in the same phrase if its intent was to accord such systems a distinctly different treatment?

(b) The decision below rests on an erroneous inference as to Congress' intent drawn from certain written materials introduced by Senator Clark during the debate on Title VII. Those materials state that Title VII would have no effect on "established" or "existing" seniority systems; from these statements, the court below inferred that Title VII *would* affect seniority systems that were *not* "established" or "existing" when the Act was passed. On its face that inference is unjustified. The assurance that Title VII would not overturn established seniority systems is not a declaration that the statute would overturn later established seniority systems. And when the Clark materials are read in the complete legislative context, including Senator Clark's own statement when he introduced those materials that "the bill would not affect seniority at all" (110 Cong. Rec. 7207), it becomes clear that the lower court's inference is not what Congress intended.

From the start of the legislative consideration of Title VII, those who sought its defeat repeated certain themes that they hoped would produce a groundswell of public opposition to the bill. Principal among these were the charges that the bill would require quotas (see *Weber*, 443 U.S. at 205-206; *id.* at 231-244 (Rehnquist, J., dissenting), and that it would destroy existing rights of seniority. The latter charge was voiced in the Minority Report accompanying the House Report,[9] in a speech by Senator Hill prior to the Senate's consideration of the bill,[10] and in speeches by Governor Wallace who was then a candidate in the Democratic presidential primaries.[11]

The court of appeals proceeded as if the supporters of the bill, to whom "we look . . . when the meaning of the

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[9] H.R. Rep. No. 914, 88th Cong., 1st Sess. 65, 71 (1963).

[10] 110 Cong. Rec. 486-489.

[11] These speeches were discussed, *inter alia*, at 110 Cong. Rec. 11471, 11486.

statutory words is in doubt" (*Schwegman Bros. v. Calvert Corp.*, 341 U.S. 384, 394-395), focused their assurances as to the limits of Title VII exclusively on existing seniority systems. The proponents did not do so; on the contrary, their assurances applied to "seniority systems" and did not distinguish pre-Act systems from post-Act systems.

The Pre-§ 703(h) Discussion.[12] The bill was considered first by the House. The Minority Report in the House had warned that the bill, if enacted, would have numerous calamitous consequences, among them that it would "destroy" seniority. H. Rep. No. 914, 88th Cong., 1st Sess. 65 (1963). When the bill reached the House floor, the opening speech in support of its passage was delivered by Representative Celler, the Chairman of the House Judiciary Committee. A portion of that speech was devoted to answering the "unfair and unreasonable criticism" which had been leveled at the bill (110 Cong. Rec. 1518). With respect to seniority, he stated:

> It has been asserted also that the bill would destroy worker seniority systems and employee rights vis-a-vis the union and the employer. This again is wrong. The bill would do no more than prevent a union, as it would prevent employers, from discriminating against or in favor of workers because of their race, religion, or national origin. [*Ibid.*].

During the course of the House debate, an amendment was proposed that would have made it unlawful to prefer one employee over another "for reasons which may have the indirect effect of causing discrimination because of race, color, religion or national origin." *Id.* at 2593. Representative Griffin explained why he could not support the amendment:

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[12] Throughout the deliberations in the House, and in the Senate until introduction of the Dirksen-Mansfield substitute late in the filibuster, there was no § 703(h) in the bill.

> The amendment of the gentleman from New Jersey refers to other practices which "may" have the "indirect effect" of discriminating on the basis of race, color, and so forth.
>
> I should like to say for the record and for the purpose of establishing legislative history, that if a union, or an employer, for that matter, engages in a practice which is a subterfuge amounting to discrimination on the basis of race, color, or creed in some indirect fashion then a court would probably find that such a practice would fall within the scope of this bill.
>
> However, so far as the gentleman's amendment is concerned, there are factors such as seniority, length of employment, and other factors which could affect union membership, union rights, and so forth, and have nothing to do with color, race, or creed.
>
> . . . I hesitate to support the amendment for the reasons I have indicated. [*Id.* at 2594].

The amendment was rejected (*id.* at 2595).

With no further reference to seniority, the bill was passed by the House, and sent to the Senate. Shortly thereafter, the Republican sponsors in the House prepared a memorandum describing the bill as passed by the House. In pertinent part, the memorandum stated:

> Title VII does not permit the ordering of racial quotas in businesses or unions and does not permit interferences with seniority rights of employees or union members [*id.* at 6566].

In the Senate, a 17-day debate ensued over whether the bill should be referred to Committee. During that period, Senator Humphrey, who was co-manager (with Senator Kuchel) of the entire Civil Rights bill, introduced a newspaper article quoting the answers of a Justice Department "expert" to the "ten most common objections to Title VII." In pertinent part it stated:

> Objection: The law would empower federal "inspectors" to require employers to hire by race. White people would be fired to make room for Negroes. Seniority rights would be destroyed. . . .
>
> Reply: The bill requires no such thing . . .
>
> . . . The bill would not authorize anyone to order hiring or firing to achieve racial or religious balance. An employer will remain wholly free to hire on the basis of his needs and of the job candidate's qualifications. What is prohibited is the refusal to hire someone because of his race or religion. Similarly, the law will have no effect on union seniority rights. [*Id.* at 5094].

On March 17, responding to a political advertisement charging that the bill would give the federal government the power to run America's businesses, Senator Humphrey, on the floor of the Senate, stated:

> Title VII . . . will prohibit discrimination in employment . . . It does not limit the employer's freedom to hire, fire, promote, or demote for any reason—or no reason—so long as his action is not based on race, color, religion, national origin, or sex. It does not interfere with job seniority . . . . [*Id.* at 5423].

The advertisement had listed "seniority in private employment" as one of the individual rights that would be lost were the bill passed (*ibid*). Senator Humphrey countered:

> [N]othing in the bill would affect any seniority plan which was not a cloak for racial or religious discrimination. [*Ibid*].

On March 26, 1964, the Senate voted to reject the motion to refer the bill to Committee (*Id.* at 6455), and on March 30, the formal debate on the bill began. Senators Humphrey and Kuchel, the co-managers, undertook "to lay the affirmative case for the bill before the Senate" (*Id.* at 6528). Each of them devoted a portion of his

speech to answering the charges respecting seniority. Senator Humphrey said:

> I hope this presentation will set to rest the doubts about this bill which have been voiced by many union members across the country. This bill is not an instrument to abolish seniority or unions themselves, as some have charged. The only standard which the bill establishes for unions and management alike is that race will not be used as a basis for discriminatory treatment. The full rights and privileges of union membership, as protected by other Federal laws and court decisions, will in no way be impaired. As a longstanding friend of the American worker, I would not support this fair and reasonable equal employment opportunity provision if it would have any harmful effect on unions. The truth is that this title forbids discriminating against anyone on account of race. This is the simple and complete truth about Title VII. [*Id.* at 6549].

Senator Kuchel, in the other major opening speech in support of the bill, made the same point:

> Title VII might justly be described as a modest step forward. Yet it is pictured by its opponents and detractors as an intrusion of numerous Federal inspectors into our economic life. These inspectors would presumably dictate to labor unions and their members with regard to job seniority, seniority in apprenticeship programs, racial balance in membership, and preferential advancement for members of so-called minority groups. Nothing could be further from the truth. . . . [T]he important point, in response to the scare charges which have been widely circulated to local unions throughout America, is that the Court cannot order preferential hiring or promotion consideration for any particular race, religion, or other group. Its power is solely limited to ordering an end to the discrimination which is in fact occurring.
>
> Neither would seniority rights be affected by this Act. [*Id.* at 6553-54].

At the close of his speech, Senator Kuchel introduced the memorandum prepared by the Republican sponsors in the House, describing the bill as enacted by the House. *Id.* at 6665-66. (That memorandum, as noted earlier, stated that "Title VII . . . does not permit interferences with seniority rights of employees or union members," *id.* at 6566.)

Each of the next several days was devoted to the sponsors' exposition of a particular title of the bill. On April 8, 1964, the speeches in support of Title VII were made by Senators Clark and Case, the bipartisan "captains" for Title VII. Senator Clark noted the charge Senator Hill had earlier made that "Title VII would undermine the vested rights of seniority" (*Id.* at 7206), and he responded:

> [I]t is clear that the bill would not affect seniority at all. It would not affect the present operation of the National Labor Relations Act or rights under existing labor laws. [*Id.* at 7207; emphasis added].

As proof of this conclusion, Senator Clark inserted in the record certain documents which, ironically, constitute the entirety of the "legislative history" which the court below declared "conclusively demonstrates that Congress intended the immunity accorded seniority systems by § 703(h) to run only to those systems in existence at the time of Title VII's effective date" (JA 143-144 and n. 5).

The first of these was a Justice Department memorandum, which stated in relevant part:

> First, it has been asserted that Title VII would undermine vested rights of seniority. Title VII would have no effect on seniority rights existing at the time it takes effect. If, for example, a collective bargaining contract provides that in the event of layoffs, those who were hired last must be laid off first, such a provision would not be affected in the

> least by Title VII. This would be true even in the case where owing to discrimination prior to the effective date of the title, white workers had more seniority than Negroes. Title VII is directed at discrimination based on race, color, religion, sex or national origin. It is perfectly clear that when a worker is laid off or denied a chance for promotion because under established seniority rules he is "low man on the totem pole" he is not being discriminated against because of his race. Of course, if the seniority rule itself is discriminatory, it would be unlawful under Title VII. If a rule were to state that all Negroes must be laid off before any white man, such a rule could not serve as a basis for discharge subsequent to the effective date of the title. I do not know how anyone could quarrel with such a result. But, in the ordinary case, assuming that seniority rights were built up over a period of time during which Negroes were not hired, these rights would not be set aside by the taking effect of Title VII. Employers and labor organizations would simply be under a duty not to discriminate against Negroes because of their race. Any differences in treatment based on established seniority rights would not be based on race and would not be forbidden by the title [*id.* at 7207].

The second document introduced by Senator Clark was an interpretative memorandum which he and Senator Case had had prepared (*id.* at 7212). In pertinent part, that memorandum stated:

> [Section 703] prohibits discrimination in employment because of race, color, religion, sex, or national origin. It has been suggested that the concept of discrimination is vague. In fact it is clear and simple and has no hidden meanings. To discriminate is to make a distinction, to make a difference in treatment or favor, and those distinctions or differences in treatment or favor which are prohibited by section [703] are those which are based on any of the five forbidden criteria, race, color, religion, sex, and

national origin. Any other criterion or qualification for employment is not affected by this title.

* * * *

Title VII would have no effect on established seniority rights. Its effect is prospective and not retrospective. Thus, for example, if a business has been discriminating in the past and as a result has an all-white working force, when the title comes into effect the employer's obligation would be simply to fill future vacancies on a nondiscriminatory basis. He would not be obliged—or indeed, permitted—to fire whites in order to hire Negroes, or to prefer Negroes for future vacancies, or, once Negroes are hired, to give them special seniority rights at the expense of the white workers hired earlier. (However, where waiting lists for employment or training are, prior to the effective date of the title, maintained on a discriminatory basis, the use of such lists after the title takes effect may be held an unlawful subterfuge to accomplish discrimination.) [*Id.* at 7213].

Finally, Senator Clark introduced written answers to certain questions that had been posed by Senator Dirksen (*id.* at 7215-16):

Question: Would the same situation prevail in respect of promotions, when that management function is governed by a labor contract calling for promotions on the basis of seniority? What of dismissals? Normally, labor contracts call for "last hired, first fired." If the last hired are Negroes, is the employer discriminating if his contract requires they be first fired and the remaining employees are white?

Answer: Seniority rights are in no way affected by the bill. If under a "last hired, first fired" agreement a Negro happens to be the "last hired," he can

still be "first fired" so long as it is done because of his status as "last hired" and not because of his race.

Question: If an employer is directed to abolish his employment list because of discrimination, what happens to seniority?

Answer: The bill is not retroactive, and it will not require an employer to change existing seniority lists. [*Id.* at 7217].

After the speeches in support of the bill were completed, the filibuster began. From that time forward, there were only occasional statements by sponsors as to the meaning of the bill.

On April 25, Senator Keating took the floor during the "morning hour" to respond to a pamphlet published by the Coordinating Committee for Fundamental American Freedoms, charging that the bill would require quotas and would "interfere with the seniority rights of employees and union members":

> "The coordinating committee has charged . . . that Title VII would . . . permit the Government to impose quotas and preferences upon employers and labor organizations in favor of minority groups. The coordinating committee also maintains that Title VII will authorize the Federal Government to interfere with the seniority rights of employees and union members.
>
> "Title VII does not grant this authority to the Federal Government. To make such assertions, as the coordinating committee does, is not only an unfortunate misinterpretation of the title's operation but is a cruel hoax because it generates unwarranted fear among those individuals who must rely upon their job or union membership to maintain their existence. [*Id.* at 9111].

On May 8, Senator Carlson introduced an analysis he had had prepared because of "the gravity of the charges against the bill." In pertinent part, the analysis stated:

> There would be no authority to require quota hiring to achieve racial balance or to order firing of whites to create jobs for Negroes. Union seniority would not be affected and employers would remain wholly free to hire or fire on the basis of job qualifications. [*Id.* at 10520].

On May 20, Senator Javits took the floor to respond to charges contained in a campaign speech by Governor Wallace:

> Another thing that people were put in fear about was seniority and trade unions. Governor Wallace said that union seniority systems would be abrogated and that white men's jobs would be taken and turned over to Negroes. That is untrue. The only thing that the bill will do—and the administration of existing state laws has confirmed it—is deal with outright cases of discrimination. [*Id.* at 11471].

Senator Humphrey, too, was upset by the "distortion" which had occurred during the Maryland primary campaign (*id.* at 11485). Governor Wallace had "completely misrepresented the bill" (*id.* at 11486). Senator Humphrey undertook a point-by-point refutation; in pertinent part:

> Then the Governor said that the bill would—"tell employers whom they can 'hire and fire' and 'destroy the seniority systems of labor unions.'"
>
> The authors of the bill in the House—those who were the architects of the bill and those in the labor movement itself—have said that that statement is totally untrue. It just is not so. [*Ibid.*].

That same day, Senator Humphrey introduced a newsletter "stating some of my observations on the Civil Rights bill, as to what it provides and what it does not provide" (*id.* at 11486). In part, the newsletter stated:

> The bill does not permit the Federal Government to require an employer or union to hire or accept for membership a quota of employees from any particular minority group.

> The bill does not permit the Federal Government to destroy the job seniority rights of either union or nonunion employees. [*Id.* at 11486].

On May 22, Senator McGovern made a speech designed to demonstrate that "[t]he horrendous powers claimed for [the bill] by its opponents simply do not exist" (*id.* at 11768). In pertinent part:

> The bill does not create any hiring quotas. The bill does not affect union seniority. [*Ibid.*].

On May 25, Senator Humphrey introduced an explanation of the House bill prepared by his staff, which he said had been "read and approved by the bipartisan floor managers of the bill in both houses of Congress" (*id.* at 11847). In pertinent part, the explanation stated:

> The Title contains no provisions which would jeopardize union seniority systems, nor would anything in the Title permit the government to control the internal affairs of employers or unions. [*Id.* at 11848].

The Post-§ 703(h) Discussion. On May 26, the Dirksen-Mansfield substitute was introduced, which added several provisions to the bill, including § 703(h). On June 4, Senator Humphrey made the major presentation explaining the purpose of the new provisions. Section 703(h), he explained,

> makes clear that it is only discrimination on account of race, color, religion, sex or national origin, that is forbidden by the title. The change does not narrow application of the title, but merely clarifies its present intent and effect. [*Id.* at 12723].

On June 18, Senator Williams of Delaware introduced a letter he had received from Senator Dirksen answering certain questions he (Senator Williams) had asked about the bill. "Since [Senator Dirksen] was the author of several of the amendments approved by the Senate I felt it was important that his interpretation of their legisla-

tive intent be incorporated in the RECORD." (*Id.* at 14329). In pertinent part, the letter from Senator Dirksen, dated June 18, 1964 (the day preceding the Senate's final vote) read as follows:

> DEAR JOHN: I have your letter of June 17 raising questions which have been brought to your attention . . . Let me set out your questions and then follow them with my views so that you will have a complete record in this letter.
>
> • • • •
>
> 10. That seniority in unions, civil service, and company employment would be jeopardized.
>
> The Senate substitute bill expressly protects valid seniority systems. [*Id.* at 14329].

Senator Williams then provided his own analysis of the improvements made by the Senate in the House bill (*id.* at 14329). In pertinent part:

> The language in the House bill placed seniority, merit, and incentive systems in jeopardy.
>
> • • • •
>
> Senate amendments permit and protect seniority, merit, and all incentive systems. [*Id.* at 14331].

On June 19, 1964, the filibuster having been broken by a vote of cloture (*id.* at 13327), the Senate adopted the Dirksen-Mansfield substitute (*id.* at 14511). As the Senate had substantially revised the House bill, the House debated a recommendation that it concur in the Senate amendments. In the course of that debate, Representative McCulloch, who had been the principal Republican sponsor in the House, stated:

> Much inaccurate information has been circulated about the legislation both as it left the House and as

> it is now before the House. In view thereof, I wish to negate only the worst glaring inaccuracies that have had such wide dissemination.
>
> • • • •
>
> Fifth. The bill does not permit the Federal Government to destroy the job seniority rights of either union or non-union employees. [*Id.* at 15893].

A few minutes later, the House voted to concur in the Senate's amendments, thus enacting the Civil Rights Act of 1964 (*id.* at 15897).

That same day, Senator Humphrey, marking the final passage of the bill, introduced an updated version of his May 25 memorandum, describing the bill as enacted (*id.* at 15865). The memorandum stated, *inter alia*, that Title VII "contains no provisions which jeopardize union seniority systems" (*id.* at 15866).

The Lessons of the Legislative History. The gist of the Congressional discussion of seniority is as follows.

First, in the House, the proponents' statements were uniformly to the effect that "Title VII . . . does not permit interferences with seniority rights of employees or union members." See *supra* pp. 14-15.

Second, in the Senate, from the opening of the debate on Title VII to the introduction of the Dirksen-Mansfield substitute, the following proponents spoke to the status of seniority—Senators Humphrey, Kuchel, Clark, Keating, Carlson, Javits and McGovern. All of the statements by the proponents spoke of "seniority" and not of "existing seniority," and those statements were uniform in their content: "Title VII . . . does not interfere with job seniority." "Neither would seniority rights be affected by this Act." "[I]t is clear that the bill would not affect seniority at all." "Title VII does not grant the authority to the Federal Government . . . to interfere with the seniority rights of employees and union members." "Union seniority would not be affected." See *supra* pp. 15-23.

In addition, Senator Clark introduced the written memoranda on which the court below placed its entire reliance. While those memoranda phrased the asserted objection to Title VII and the response in terms of the bill's effect on "vested," "existing" or "established" seniority rights, that is because they were responding to a charge made by the bill's opponents, and were providing an assurance tailored to the charge: the claim that the bill would affect existing seniority rights was false; the bill would *not* affect existing seniority rights. There is no suggestion in those memoranda that the bill while protecting *pre*-Act *bona fide* seniority systems would invalidate *post*-Act *bona fide* seniority systems. Not only did Senator Clark in introducing the memoranda state "it is clear that the bill would not affect seniority at all," at the same time he also introduced written responses to questions posed by Senator Dirksen, and one of those answers stated:

> Seniority rights are in no way affected by the bill. If under a "last hired, first fired" agreement a Negro happens to be the "last hired," he can still be "first fired" so long as it is done because of his status as "last hired" and not because of his race.

See *supra* pp. 18-21.

Third, the few post-§ 703(h) references to seniority all are to the effect that "The Senate substitute bill expressly protects valid seniority systems." See *supra*, pp. 23-24.

Finally, it should be noted that prior to the adoption of § 703(h), Title VII did not separately address seniority. Thus, the pre-§ 703(h) assurances that Title VII "would not affect seniority at all" could not have been based on the concept that established seniority systems were especially protected, and must have reflected the understanding succinctly stated in the Justice Department memorandum:

> If . . . a collective bargaining contract provides that in the event of layoffs, those who were hired last

> must be laid off first, such a provision would not be affected in the least by title VII. This would be true even in the case where owing to discrimination prior to the effective date of the title, white workers had more seniority than Negroes. Title VII is directed at discrimination based on race, color, religion, sex or national origin. It is perfectly clear that when a worker is laid off or denied a chance for promotion because under established seniority rules he is "low man on the totem pole" he is not being discriminated against because of his race. . . . Any difference in treatment based on established seniority rights would not be based on race and would not be forbidden by the title. [See *supra*, pp. 18-19].

In other words, those assurances evince an understanding that even where there has been pre-Act discrimination against blacks in hiring or placement, application thereafter of neutral seniority rules does not constitute discrimination on the basis of race within the meaning of what is now §§ 703(a) and (c). As Senator Humphrey explained, the addition of § 703(h) "does not narrow application of the Title, but merely clarifies its present [pre-Dirksen-Mansfield substitute] intent and effect."

The totality of evidence, including the Clark memoranda, thus does not support the far-reaching limitation on § 703(h) found by the court below.

3. The Statutory Scheme.

This Court has deemed significant in construing Title VII both the overall purpose of that statute and its inevitable intersection with the national labor policy. *Emporium-Capwell Co. v. Community Org.*, 420 U.S. 50, 69-70; *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417-418; *Trans World Airlines v. Hardison*, 432 U.S. 63, 79; *Steelworkers v. Weber*, 443 U.S. 193, 201-204; *California Brewers Assn. v. Bryant*, 444 U.S. 598, 608. A construction of § 703(h) that limited its application to seniority systems in place on July 2, 1965, would do violence both to the overall purposes of Title VII and to the national labor policy.

(a) *The purposes of Title VII.* Title VII was intended as a "spur or catalyst" to broadening employment opportunities for minorities. *Albemarle, supra,* 422 U.S. at 418; *Weber, supra,* 443 U.S. at 204. That objective is not confined to the minimum steps Title VII *requires* employers and unions to take to bring their practices into conformity with the statute.

> The Court has . . . held that a collective-bargaining agreement may go further, enhancing the seniority status of certain employees for purposes of furthering public policy interests beyond what is required by statute, even though this will to some extent be detrimental to the expectations acquired by other employees under the previous seniority agreement. [*Franks, supra,* 424 U.S. at 778-779. See also *Weber, supra,* 443 U.S. at 201-204.]

It is most unlikely that Congress intended to deter such ameliorative steps by immunizing seniority systems as they existed on July 2, 1965 but withdrawing that immunity if the parties thereafter broadened their seniority systems in a manner beneficial to minorities. Yet, as the dissent below emphasized (and the majority below implicitly acknowledged), that is precisely the effect of construing § 703(h) as merely a "grandfather" clause. If a seniority system in effect on July 2, 1965 provided for job seniority, a conversion thereafter to departmental seniority (which would broaden mobility, and thus benefit pre-Act discriminatees) would, under the decision below, remove the protection of § 703(h) and subject the employer and union to Title VII liability because, by not providing even *broader* mobility (i.e. plant or company seniority), the changed system would be deemed to perpetuate the effects of pre-Act discrimination.[13] Similarly, any change in lines of progression, even if it reduced the

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[13] See, e.g., *United States v. Bethlehem Steel Corp.*, 446 F.2d 652, 658-659 (2nd Cir. 1971); *Pettway v. American Cast Iron Pipe Co.*, 494 F.2d 211, 223-224 (5th Cir. 1974).

"steps" necessary to reach the most desirable jobs, would, under the decision below, remove the protection of § 703(h) from the LOPs altogether, and subject them to invalidation except to the extent justified by "business necessity." [14] The decision below thus would make Title VII a deterrent to step by step progress. It would tend to freeze pre-1965 seniority patterns into perpetual place.

(b) *The relation of Title VII to the national labor policy.* As this Court has recognized, Title VII in general (*Emporium-Capwell, supra*) and § 703(h) in particular, must be construed with the knowledge that Congress did not intend to intrude unnecessarily upon core principles of national labor policy.

> Collective bargaining, aimed at effecting workable and enforceable agreements between management and labor, lies at the core of our national labor policy, and seniority provisions are universally included in these contracts. Without a clear and express indication from Congress, we cannot agree . . . that an agreed-upon seniority system must give way . . . [*TWA v. Hardison, supra*, 432 U.S. at 79].

And, as the Court elaborated in *California Brewers, supra*, 444 U.S. at 606:

> Congress passed the Civil Rights Act of 1964 against the backdrop of this Nation's longstanding labor policy of leaving to the chosen representatives of employers and employees the freedom through collective bargaining to establish conditions of employment applicable to a particular business or industrial environment. See generally *Steelworkers v. Weber*, 443 U.S. 193. It does not behoove a court to second-guess either that process or its products. *Porter Co.*

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[14] See, e.g., *Stevenson v. International Paper Co.*, 516 F.2d 103, 114-115 (5th Cir. 1975); *Rogers v. International Paper Co.*, 510 F.2d 1340, 1355 (8th Cir. 1975), *vacated on other grounds*, 423 U.S. 809.

> *v. NLRB*, 397 U.S. 99. Seniority systems, reflecting as they do, not only the give and take of free collective bargaining, but also the specific characteristics of a particular business or industry, inevitably come in all sizes and shapes. See *Ford Motor Co. v. Huffman*, 345 U.S. 330; *Aeronautical Lodge v. Campbell*, 337 U.S. 521. As we made clear in the *Teamsters* case, seniority may be "measured in a number of ways" and the legislative history of § 703(h) does not suggest that it was enacted to prefer any particular variety of seniority system over any other. 431 U.S., at 355, n. 41.
>
> . . . Significant freedom must be afforded employers and unions to create differing seniority systems.[15]

In the natural course of events both "the give and take of free collective bargaining" and "the specific characteristics of a particular business or industry" will force changes in a seniority system over time. Unions often seek broad seniority principles in order to maximize the role length of service plays in determining job opportunities, while employers customarily seek narrower applications of seniority to maximize the retention of employees on jobs with which they are familiar and on which they have developed experience and skills. U.S. Dept. of Labor, Bulletin 908-11, *Collective Bargaining Provisions-Seniority* (1949), p. 14. Shifts in relative bargaining power, or in the importance the parties place on this

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[15] The Court added: "But that freedom must not be allowed to sweep within the ambit of § 703(h) employment rules that depart fundamentally from commonly accepted notions concerning the acceptable contours of a seniority system," *id.* at 608. The decision below was not responding to that *caveat*. The court below assumed that the system at issue here would have been protected by § 703(h) had it been adopted prior to July 2, 1965, i.e. that it did *not* "depart fundamentally from commonly accepted notions concerning the acceptable contours of a seniority system." The vice of the system here, according to the court below, was its timing, not its content.

issue compared to others, are likely to alter the system. Another significant catalyst to change in seniority systems is change in the "specific characteristics" of the employer. Congress was acutely aware in enacting Title VII that automation was radically altering the workplace in America. *Weber*, 443 U.S. at 202. Automation calls for changes in established seniority systems to adapt the system to differences in job requirements and to altered relationships between jobs, and to protect employees whose jobs are eliminated as others are created. To take a simple example, whenever a new job is created, the union and employer must change some LOP by inserting that job into the LOP.

The genius of collective bargaining, and a substantial reason for "encouraging [this] practice and procedure" (§ 1 of the NLRA), is that the bergaining process provides a salutary means for adapting the rules of the shop to changes in the needs and desires of the parties and to the demands of a dynamic economy and an onrushing technology. Indeed, the failure of a business or industry and the workers involved to accommodate their methods of doing business to new circumstances is likely to cost all concerned their livelihood. We do not believe that Congress can fairly be charged with an intent to impose stiff penalties on legitimate changes in seniority rules, and thus to deter employers and unions from making such natural changes. Yet that is what the lower court's reading of Title VII does.

CONCLUSION

For the reasons set forth above, the decision below should be reversed.

Respectfully submitted,

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